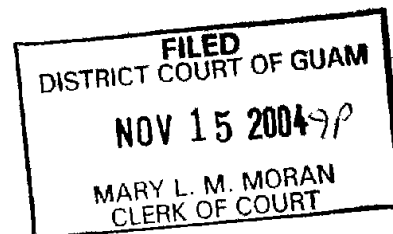


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10
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12 IN THE UNITED STATES DISTRICT COURT
13 DISTRICT OF GUAM

14 JAY MERRILL, et. al.,

15 Plaintiffs,

16 -v-

17 THE GUAM ELECTION COMMISSION, et. al.

18 Defendants.

CIVIL CASE NO. 04-00046

(Superior Court of Guam
Civil Case No. CV1111-04)

**OPPOSITION TO THE ATTORNEY
GENERAL'S MOTION TO STRIKE
THE APPEARANCES AND
OBJECTIONS OF THE GOVERNOR
AND LEGISLATURE**

1 On October 18 and October 25, 2004, two lawsuits¹ were filed in the Superior
2 Court of Guam to enjoin the then-upcoming election on Proposal A. The lawsuits named the
3 Governor, Legislature, Election Commission, and Director of the Election Commission as
4 defendants. On October 26, the Attorney General removed these actions.

5
6 On October 27, the Guam Legislature adopted Bill 374 to permit the November 2,
7 2004 vote on Proposal A to go forward. The Governor of Guam signed Bill 374 into law, thereby
8 permitting the November 2, 2004 vote on Proposal A to go forward. That same day, assistant
9 attorney general Robert Weinberg purported to sign on behalf of the Election Commission, the
10 Legislature, and the Governor a stipulated preliminary injunction to prevent the election.

11 Upon learning of the stipulation, the Governor and Legislature entered
12 appearances through independent counsel. They stated objections to the stipulated preliminary
13 injunction that had been entered into without their consent or knowledge. The Guam Election
14 Commission entered a similar objection through independent counsel the next day.

15
16 On October 29, 2004, this Court entered an Order denying the stipulation and *sua*
17 *sponte* staying the matter “pending the November 2, 2004 election results.” (Order at 4.) The
18 Court held: “It seems highly inappropriate to bind the Government of Guam to a stipulation and
19 order where it appears that the AG may not be the government’s counsel.” (*Id.* at 3.)
20 Nonetheless, that same day, the Attorney General moved to strike the appearances by the
21 Legislature and the Governor.

22
23 After the Court entered its Order, the Attorney General filed a Motion to Strike the
24 appearance by the Governor and Legislature and their objections to the stipulated injunction.
25 Because this matter was stayed at least until November 9, 2004 (when the election results were
26

27
28 ¹ *Merrill v. Guam Election Comm’n*, Dist. Ct. of Guam Case No. CV04-00046, and
Aguon-Schulte v. v. Guam Election Comm’n, Dist. Ct. of Guam Case No. CV04-00045.

1 certified), any response is due no earlier than 14 days after the stay was lifted (*i.e.*, November 23,
2 2004). *Cf.* L.R. 7.1(D)(2)(a).

3 The Governor and Legislature have every right to appear in this litigation and to
4 object to the entry of the stipulated preliminary injunction (as does the Election Commission,
5 whose appearance the Attorney General has not yet moved to strike).² The Governor and
6 Legislature possess the executive and legislative powers of Guam. 48 U.S.C. §§ 1422, 1423(a).
7 The Attorney General cannot strip them of these powers and duties in a stipulated order.
8

9 The Guam Supreme Court already has rejected the Attorney General's view that
10 he can ignore his clients. Soon after the present Attorney General took office, in a case before the
11 Guam Supreme Court, he attempted to assert the right to withdraw his clients' brief. His clients
12 were the executive officers of the Government of Guam, including the Governor. The Supreme
13 Court refused to permit the withdrawal of the brief until the Attorney General obtained the
14 consent of the executive officers at issue. *See Pangelinan v. Guitierrez*, Sup. Ct. Case No. CVA
15 02-003 (Order Feb. 10, 2003) at 1 ("On February 6, 2003, at the oral argument in this matter, *the*
16 *court ordered the Attorney General to submit the written consent of all named government parties*
17 *to withdraw the brief.* The Attorney General submitted such written consent on February 6, 2003.
18 *Based upon the consent of all named government parties* the court hereby grants the Attorney
19 General's motion to withdraw the brief.") (emphasis added).
20
21

22 Nor does the Attorney General's only Guam case, *Moylan v. Camacho*, Super. Ct.
23 of Guam Case No. SP230-03 (Dission Yan Otden Nov. 10, 2003), support his motion. Although
24 holding that the Attorney General can sue the Governor in mandamus, it also held as follows:
25
26

27 ² The Attorney General raises numerous important issues regarding the Organic Act that
28 bear no relevance to this question. The Governor will address those issues in a supplemental
opposition.

1 In coming to this conclusion, the Court does not intimate that the
2 Attorney General has the final determination of what is in the
3 public interest. The Governor may very well have a different
4 view of what is the public interest. When their positions
5 conflict as to the public interest, it is appropriate that the
6 Courts determine what the public interest calls for.

7 *Id.* at 43 (emphasis added).

8 Jurisdiction after jurisdiction has recognized that attorneys general must serve their
9 clients in the courts or step aside in favor of independent counsel:

- 10 • *Motor Club of Iowa v. Dept. of Transp.*, 251 N.W.2d 510, 515-16 (Iowa 1977)
11 (“[T]he attorney general urges his claim of total dominion over litigation is in no
12 way dictatorial because the courts alone make final decisions. We are
13 unpersuaded. The attorney general claims the right to decide which cases will be
14 prosecuted or defended and which cases will or will not be appealed. He claims
15 the right to present or not present various issues, arguments and considerations. No
16 court can make final decisions of cases and issues not brought before it.”).
- 17 • *Chun v. Bd. of Trustees*, 952 P.2d 1215, 1234 (Haw. 1998) (“[W]e do not accept
18 the Attorney General's contention that, merely because she regards her duty to
19 represent the ‘state’s’ legal interests as being paramount to her duty to represent
20 her statutory client's legal interests, she may, in her sole discretion, so control the
21 course of litigation as to advance her view of the ‘public welfare’ when it squarely
22 conflicts with the substantive position taken by the policy-making state
23 governmental instrumentality whom she represents as a named party....”).
- 24 • *State ex rel. Amerland v. Hagan*, 175 N.W. 372, 374 (N.D. 1919) (“[A]lthough it
25 is perfectly obvious under the statute that the attorney general is the general and
26 legal advisor of the various departments and officers of the state government, and
27 entitled to appear and represent them in court, this does not mean that the attorney
28 general, standing in the position of an attorney to a client, who happens to be an
29 officer of the government, steps into the shoes of such client in wholly directing
30 the defense and the legal steps to be taken in opposition or contrary to the wishes
31 and demands of his client or the officer or department concerned.”).³
- 32 • *Manchin v. Browning*, 296 S.E.2d 909, 919-20 (W. Va. 1982) (“When the official
33 policies of a particular state officer or agency are called into question in civil
34 litigation, that officer or agency is entitled to the same access to the courts and
35 zealous and adequate representation by counsel to vindicate the public interest, as
36 is the private citizen to vindicate his personal rights.”).

3 ³ Overruled on other grounds in *Benson v. North Dakota Workmen's Compensation
Bureau*, 283 N.W.2d 96 (N.D. 1979).

- 1 • *State ex rel. Allain v. Mississippi Public Serv. Comm'n*, 418 So.2d 779, 784 (Miss.
2 1982) ("The unique position of the Attorney General requires that when his views
3 differ from or he finds himself at odds with an agency, then he must allow the
4 assigned counsel or a specially appointed counsel to represent the agency
5 unfettered and uninfluenced by the Attorney General's personal opinion.").
- 6 • *Tice v. Department of Transp.*, 312 S.E.2d 241, 245 (N.C. App. 1984) ("We do not
7 believe the legislature, by providing that the Attorney General would serve as
8 counsel for State departments, intended to authorize him to make decisions in
9 areas which have been specifically delegated to a designated department. ... [T]he
10 legislature intended that when the Attorney General represents a State
11 department...the traditional attorney-client relationship should exist.").
- 12 • *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999
13 F.2d 831, 843 (5th Cir. 1993) (en banc) ("The Attorney General's power to settle
14 for his clients is certainly no less than that of other lawyers, but . . . [it is not] any
15 greater. No lawyer may forge a settlement agreement over the express objection
16 of his client. Here, to the extent that Morales represents the Chief Justice in the
17 Justice's defense of his constitutionally assigned task, he may not ignore him.").
- 18 • *State ex rel. Howard v. Oklahoma Corporation Commission*, 614 P.2d 45, 50 (Okla.
19 1980) (department could retain counsel of its choosing where the attorney general
20 disagreed with its views).
- 21 • *Public Utility Comm'n of Texas v. Cofer*, 754 S.W.2d 121, 125 (Tex. 1988) ("We
22 emphasize that when a statute confers a right upon the attorney general to
23 represent an agency, it imposes a corollary duty, and the agency has every right to
24 expect the same diligent and faithful representation as any other 'client.'").
- 25 • *Santa Rita Mining Co. v. Department of Property Valuation*, 530 P.2d 360, 363
26 (Ariz. 1975) ("The Attorney General is the attorney for the agency, no more. In
27 the instant case the Attorney General did not have the power to appeal against the
28 wishes of his client.").

21 As for the Attorney General's misleading citations, none holds or suggests that an
22 Attorney General can prevent the Governor or Legislature from accessing the courts or
23 advocating their policies in the courts. Those cases all mandate that the Governor and Legislature
24 have an opportunity to be heard:

- 25 • *Reiter v. Wallgren*, 184 P.2d 571, 576 (Wash. 1947) ("[I]t would be an anomalous
26 situation if the Governor, having the supreme executive power of the state, was
27 unable to secure such a determination because of the failure or refusal to act on the
28 part of one having less power. Some of the expressions referred to in our cases
above cited are broad enough to indicate that the Attorney General only may

1 maintain an action such as this, and, as applied to the facts in the particular cases,
2 the statements therein contained are correct. But it must be remembered that in
3 none of those cases was the Governor a party, nor were we in any of them called
4 upon to construe the above-quoted provisions of our Constitution concerning the
5 powers, rights, and duties of the Governor.”) (quotation omitted).

- 6 • *Secretary of Adm. & Finance v. Attorney General*, 326 N.E.2d 334, 339 n.8 (Mass.
7 1975) (“where there is a policy disagreement between the Attorney General and
8 the Governor or his designee, the appropriate procedure would be for the Attorney
9 General to appoint a special assistant to represent the Governor’s interests”).
- 10 • *Ex parte Weaver*, 570 So.2d 675, 684 (Ala. 1990) (“We recognize that there may
11 be times when the Governor disagrees with the attorney general about matters in
12 litigation. . . . [T]he Governor, . . . may intervene in any such litigation. [Citation
13 omitted]. As an intervenor, the Governor may express his views and take positions
14 contrary to those argued by the attorney general.”) (footnotes omitted).


15 The Attorney General’s remaining cases deal with irrelevant issues and will be discussed in the
16 Governor’s supplemental opposition brief.

17 Because the Attorney General does not have the right to silence the Government, it
18 follows that the Governor and the Legislature, through counsel, can appear in this litigation and
19 file their objections to the stipulated injunction.

20 Dated this 15th day of November, 2004.

21 OFFICE OF THE GOVERNOR OF GUAM
22 CALVO AND CLARK, LLP
23 Attorneys at Law

24 By:

25 
26 MICHAEL A. PANGELINAN